

75 Eisenhower Parkway, Suite 200 Roseland, NJ 07068-1600 Tel 973.992.4800 Fax 973.992 9125 www foxrothschild com

Theodore M. Eisenberg Phone: 973 994.7533 teisenberg@foxrothschild.com

August 23, 2012

VIA FEDEX

Lester A. Heltzer, Executive Secretary National Labor Relations Board 1099 14th Street, N.W. Washington, D.C. 20570-0001

Re: <u>Trump Plaza Associates and International Union, United Automobile Aerospace & Agricultural Implement Workers of America, AFL-CIO 4-RC-21263</u>

Dear Executive Secretary Heltzer:

This Firm is labor counsel to Trump Plaza Associates, LLC d/b/a Trump Plaza Hotel and Casino ("Trump Plaza") in connection with the above-referenced matter. Please find attached the original and eight copies of Trump Plaza's Statement of Position Upon Remand by the United States Court of Appeals for the District of Columbia.

Very truly yours,

Theodore M. Eisenberg

TME:lvb Enclosures

Cc

Dorothy L. Moore-Duncan, Regional Director (NLRB) (via FedEx)

William T. Josem, Esq. (via FedEx)

A Pennsylvania Limited Liability Partnership

Nevada

2012 AUG 24 PH 12: 00

ORDER SECTION

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRUMP PLAZA ASSOCIATES, d/b/a TRUMP PLAZA HOTEL AND CASINO

Employer

and

4-RC-21263

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO

Petitioner

EMPLOYER'S STATEMENT OF POSITION UPON REMAND BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Theodore M. Eisenberg, Esq. Matthew R. Porio, Esq. Attorneys for Employer Fox Rothschild LLP 75 Eisenhower Parkway, Suite 201 Roseland, New Jersey 07068 (973) 994-7533 (973) 992-9125/facsimile

TABLE OF CONTENTS

<u>Page</u>
SUMMARY OF THE CASE
SUMMARY OF RELEVANT FACTS
ARGUMENT
I. THE REMAND IS GOVERNED BY THE LAW OF THE CASE
II. THE LAW OF THE CASE IS THAT THE LANGUAGE OF THE CERTIFICATION "SUGGEST[ED] THAT THE BOARD COULD HAVE HAD A ROLE THEREIN."
III. THE LAW OF THE CASE IS THAT THE CERTIFICATION WAS "WIDELY DISSEMINATED" REQUIRING THAT THE OBJECTIONS BE SUSTAINED IN LIGHT OF THE CERTIFICATION'S SUGGESTION OF BOARD INVOLVEMENT 14
CONCLUSION

TABLE OF AUTHORITIES

ASES Pag	ge(s)
lied Elec. Prods. Inc, 109 N.L.R.B. 1270:	10
cher Service, Inc., 298 N.L.R.B. 312 (1990)	4, 15
E. Wylie Const. Co., 310 N.L.R.B. 721 (1993)	9
ity of Cleveland, Ohio v. Federal Power Commission, 561 F.2d 344 (D.C. Cir. 1977)	8
olumbia Tanning, 238 N.L.R.B. 899 (1978)10	0, 15
lacier Packing, 210 N.L.R.B. 571 (1974)	16
offstown Truck Ctr., Inc., 356 N.L.R.B. No. 33 (2010)11	1, 12
udson Aviation, 288 N.L.R.B. 870 (1988)	15
pact Industries, 293 NLRB 794 (1989)	9
re Freund Baking Co., 336 N.L.R.B. 847 (2001)	15
ternational Longshoremen's Ass'n, AFL-CIO, 323 NLRB 1029 (1997)	8
Ray McDermott & Co., Inc., 215 N.L.R.B. 570 (1974)12, 13	3, 16
ount Carmel Medical Center, 306 N.L.R.B. 1060 (1992)	4

N.L. Atlas Bradford, 240 N.L.R.B. 517 (1979)15
Ryder Memorial Hosp., 351 N.L.R.B. 214 (2007)
Thiokol Chemical Corp., . 202 N.L.R.B. 434 (1973)
Trump Plaza Assocs., 352 N.L.R.B. 628 (2008)
Trump Plaza Assocs., 352 N.L.R.B. No. 146 (2008)
Trump Plaza Assocs., 355 N.L.R.B. No. 202 (2010)
Trump Plaza Assocs., 356 N.L.R.B. No. 53 (2010)
<i>Trump Plaza Assocs. v. NLRB</i> , 679 F.3d 822
United States v. Pineiro, 470 F.3d 200 (5th Cir. 2006)
Usery Cos., 311 NLRB No. 41 311 NLRB No. 41 (1993)
Westside Hospital, 218 NLRB 96 (1975)

÷ ,

SUMMARY OF THE CASE

On February 15, 2007, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("Union" or "UAW") filed a representation petition with Region 4 seeking to represent Trump Plaza Associates, LLC's ("Plaza") table games' dealers. 2008 General Counsel Motion for Summary Judgment ("GC MSJ") at Exhibit #1. On March 31, 2007, the NLRB held a secret-ballot election, and the Plaza lost by a vote of 324 to 149. GC MSJ at Exhibit #3. On April 9, 2007, the Plaza timely filed Objections to Election and the Regional Director for Region 4 ("Regional Director") issued a Notice of Hearing on Objections to Election. GC MSJ at Exhibit #4; BEX F¹.

On May 23, 2007, Administrative Law Judge Robert A. Giannasi ("ALJ") presided over a one-day hearing on objections and issued his decision on June 29, 2007 dismissing the objections, and directing the Regional Director to issue the appropriate certification. *Trump Plaza Assocs.*, 352 N.L.R.B. 628, 630-34 (2008). The Plaza filed timely exceptions to the ALJ's decision with the Board, and on May 30, 2008 the Board affirmed the ALJ's decision and issued a Certification of

The following abbreviations will be used throughout this brief: (i) BEX — Board Exhibit to the Hearing on Objections, (ii) ERX — Employer Exhibit to the Hearing on Objections, (iii) UEX — Union Exhibit to the Hearing on Objections, (iv) TPB — Trump Plaza's Brief in Support of its Exceptions to the Administrative Law Judge's Decision (dated July 12, 2007), (v) TR — Transcripts to the Hearing on Objections.

Representative that certified the Union as the exclusive bargaining representative of the Plaza's table games' dealers. *Id.* at 630.

In dismissing the Plaza's objections, the Board declined to evaluate a mock card-check that resulted in a United States Congressman issuing a competing certification of Union majority status "in accordance with NLRB rules" ("Certification"), and based its decision solely on its finding that the:

[E]vent/document does not justify setting aside the election, given the absence of evidence that more than a few voters were aware of the "Certification" and the wide margin of the Union's victory. Thus, we need not address whether the "Certification" would have a tendency to coerce reasonable employees' free choice in the election.

Trump Plaza Assocs., 352 N.L.R.B. at 629.

On June 5, 2008, the Union requested that the Plaza commence bargaining. GC MSJ at Exhibit #6. The Plaza rejected the Union's request, asserting that the "election results [were] not valid in accord with governing law." GC MSJ at Exhibit #7. The Union filed an unfair labor practice with Region 4 alleging that the Plaza refused to bargain, and the Regional Director issued a Complaint regarding the Plaza's refusal to bargain. GC MSJ at Exhibit #8, #9, and #10. The Plaza filed its Answer, stating that its refusal to bargain with the Union was based on the invalidity of the certification. GC MSJ at Exhibit #11. The Board's General Counsel moved for summary judgment, the Plaza responded, and a two-

Member Board granted the GC's motion, ordering the Plaza to bargain with the Union. GC MSJ; *Trump Plaza Assocs.*, 352 N.L.R.B. No. 146 (2008).

On September 18, 2008, the Plaza filed a Petition for Review with United States Court of Appeals for the District of Columbia Circuit ("Court"), challenging, *inter alia*, the authority of two Board Members to issue decisions. The Court ordered the proceeding to be held in abeyance. Thereafter, the United States Supreme Court issued *New Process Steel*, 130 S. Ct. 2635 (2010), finding that the Board had lacked a quorum, and the Board moved to remand. The Court granted the Motion to Remand and issued its Mandate.

Following the Court's Mandate, the Board issued a Decision, Certification of Representative, and Notice to Show Cause why the GC's Motion for Summary Judgment should not be granted. *Trump Plaza Assocs.*, 355 N.L.R.B. No. 202 (2010). Pursuant to the Board's decision, the Regional Director filed an Amended Complaint, the Plaza filed an Amended Answer, and both parties filed responses to the Notice to Show Cause.

On December 13, 2010, the Board issued its second Decision and Order directing the Plaza to bargain with the Union. *Trump Plaza Assocs.*, 356 N.L.R.B. No. 53 (2010). On December 15, 2010, the Plaza filed a Petition for Review with the Court. On May 11, 2012 the Court granted the Plaza's Petition for Review.

The Court found that the Board's reliance on the margin of victory and the lack of dissemination of the mock card-check Certification as the basis to deny the objections departed from Board precedent without "reasoned explanation." *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 831-32 (2012). The Court cited, *inter alia, Archer Service, Inc.*, 298 N.L.R.B. 312 (1990) and *Mount Carmel Medical Center*, 306 N.L.R.B. 1060 (1992), where the Board had overturned other elections based on lesser showings of dissemination in the context of wider margins of victory. *Id.*

The Court found that under Board precedent it must evaluate the adequacy of dissemination in light of the nature of the challenged conduct, i.e., the Certification of the mock card-check. *Id.* at 830-31. The Court vacated the Board's Order and remanded the underlying case to the Board to:

[F]irst, assess the severity of the challenged conduct — to wit, Trump Plaza's contention that the mock card-check constituted "a fundamental breach of Board neutrality," which misled voters to believe the election was a "foregone conclusion," id. at 33 — and second, to reassess the extent of the mock card-check dissemination under [Board] precedent.

Id. The Court noted that unlike the statements of Union support by politicians, the representation that the "Certification of Majority Status" was conducted "in

² The Court rejected the Plaza's contention that expressions of support for the Union by various public officials could reasonably be read as suggesting Board endorsement of unionization. *Id.* at 829.

accordance with the NLRB rules', suggest[ed] the Board could have had a role therein." *Id.* at 832 n.4 (internal citation omitted).

On July 5, 2012 the Court issued its Mandate, and on July 20 the Board accepted remand and requested statements of position.

SUMMARY OF RELEVANT FACTS

On March 25, 2007, six days before the election, the Union held a rally in Atlantic City. ERX #6. This rally, which was covered by NBC40 Television, was attended by Union officials, as well as federal, state and local government officials, and two Plaza dealers. Tr. 48. The newscaster, covering the televised rally, stated to the assembly and to the television audience, *inter alia*, that:

Representative Robert Andrews led a bipartisan "card check" authorization for Trump Plaza Casino Dealers. The results of the "card check" showed certification of majority status for forming a Union at Trump Plaza. This comes on the heels of last week's similar election at Caesar's Casino, when more than 80 percent voted in favor of forming their own union as part of the UAW union State Senator, Sonny McCullough, Assemblyman, Jim Whelan and Reverend, Reginald Floyd, joined Representative Andrews to sign the "card count" to confirm verification that the dealers want to join the UAW Union 3

ERX #7 (emphasis added).

³ At the end of the broadcast, the newscaster stated that the "actual vote will be held this Saturday." ERX #6.

Behind the speaker was a large "Certification of Majority Status" on a white board, supported by an easel. ERX #6. The camera focused on the "Certification" language and the signatures of the government officials. Congressman Andrews expressed his support for "the very courageous dealers at Trump" that were speaking for themselves and banding together in connection with the card-check certification. ERX #6. The executed "Certification of Majority Status", dated March 25, 2007, stated:

.

We, the undersigned, conducted a confidential examination of Union authorization cards for the purpose of determining whether a majority of full time and regular part-time dealers, dual-rate dealers, and dual-rate supervisors at Trump Plaza Hotel and Casino, have authorized the International Union, UAW (the "Union") to represent them in collective bargaining.

The verification of the Union's majority was conducted by means of a comparison of a copy of the original signed cards and a list of current eligible employees in the bargaining unit provided by Trump Plaza Hotel and Casino in accordance with NLRB rules.

The undersigned *certify* that, based on our confidential examination of the cards, as described above, the *majority* of the Trump Plaza Hotel and Casino full-time and regular part-time dealers, dual-rate dealers, and dual-rate supervisors *have authorized the UAW to represent them for the purposes of collective bargaining.*

ERX #3 (emphasis added). The Certification proceeding was broadcasted on the 11:00 p.m. news on March 25. Tr. 36, ERX #5 and #6. The viewing area covered

by the broadcast covered counties in which 87% of the Plaza's dealers resided. ERX #8.

Except for the "Certification of Majority Status", the specifics of the document, although panned by the television camera, could not be easily read by a television audience. The language, however, was clearly visible to those in attendance at the rally, which included two Plaza dealers. Tr. 44.⁴

The parties stipulated that the actual "Certification of Majority Status" was moved, after the television broadcast, to the Union campaign headquarters, where it remained on display until the election on March 31. Tr. 31-32. It was also stipulated that the "Certification of Majority Status" was reproduced, left on tables in the Union's campaign headquarters "and made available to dealers who came into the union hall so they could read it and take it." Tr. 31-32. The Union Hall was a place for regular organizing meetings, as reported on the Union's website: "Please, get out to one of our meetings, it's not just educational, but inspiring. Thursdays at the Union Hall" ERX # 4(g).

ARGUMENT

I. THE REMAND IS GOVERNED BY THE LAW OF THE CASE

The Court of Appeals' mandate controls all issues that "were actually considered and decided by the appellate court, or as were necessarily inferred from

⁴ The Certification was also covered by two newspapers. UEX 3, UEX 4.

the disposition on appeal." *NLRB vs. Goodless Brothers Electric Co. Inc.*, 285 F.3d 102, 107 (1st Cir. 2002), (citing *Cohen v Brown Univ.* 101 F. 3d 155 (1st Cir 1996)) (quoting *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 770 (1st Cir. 1994)).

As explained by the D.C. Court of Appeals, "the decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter 'is without power to do anything which is contrary to either the letter or spirit of the mandate ..." City of Cleveland, Ohio v. Federal Power Commission, 561 F.2d 344, 346 (D.C. Cir. 1977) (quoting Yablonski v. UMW, 454 F.2d 1036, 1038 (D.C. Cir. 1971)). See also, United States v. Pineiro, 470 F.3d 200, 205 (5th Cir. 2006) (The mandate rule "prohibits a district court on remand from reexamining an issue of law or fact previously decided on appeal and not re-submitted to the trial court on remand. This prohibition covers issues decided both expressly and by necessary implication.")

An appellate court's mandate controls not just lower courts, but administrative agencies as well. *City of Cleveland, supra* at 346. The Board has acknowledged that on remand it is bound by the appellate court's factual and legal holdings. *See e.g., International Longshoremen's Ass'n, AFL-CIO*, 323 NLRB 1029 (1997) ("Having accepted the remand in this case, we are bound by the court's opinion as the law of the case. Applying the principles set forth by the

court, we find, for the reasons set forth below, that the complaint should be dismissed."); *C.E. Wylie Const. Co.*, 310 N.L.R.B. 721 (1993) ("Having accepted the remand as the law of the case, we are bound by the court's standard for determining the breadth of the Order."); *Impact Industries*, 293 NLRB 794 (1989) ("Having accepted the Seventh Circuit's remand as the law of the case, however, we are bound by the court's rationale as it applies to this proceeding...").

Herein, the Board determination on remand is necessarily constrained by the Court's findings with respect to: (i) the inference to be drawn from the Certification, (ii) the wide dissemination of the Certification, and (ii) the margin of victory not being controlling under Board precedent.

II. THE LAW OF THE CASE IS THAT THE LANGUAGE OF THE CERTIFICATION "SUGGEST[ED] THAT THE BOARD COULD HAVE HAD A ROLE THEREIN."

The Court has instructed the Board to decide whether the Certification "constituted 'a fundamental breach of Board neutrality." *Trump Plaza*, 679 F.3d at 831. The Court has found, and it is the law of the case, that:

[T]he "Certification of Majority Status" recited that Andrews's McCulloughs's and Whelan's examination of the Union authorization cards was conducted in accordance with NLRB rules," [citation omitted] suggesting the Board could have had a role therein.

Id. at 832 fn.4 (emphasis added).

,* .*

The Board has found such "suggestion" sufficient grounds to overturn an election, in light of its duty to scrupulously guard its neutral status. The applicable test was first annunciated by the Board in *Allied Elec. Prods. Inc*, 109 N.L.R.B. 1270:

The Board is necessarily concerned with the protection of its procedures designed to provide fair elections. The Board particularly looks with disfavor upon any attempt to misuse its processes to secure partisan advantage, and especially does it believe that no participant in a Board election should be permitted to *suggest either directly or indirectly to voters* that this Government Agency endorses a particular choice.

Id. at 1271-72 (emphasis added).⁵

The test was reaffirmed in *Columbia Tanning*, 238 N.L.R.B. 899, 899-900 (1978) (citing *Allied Electric Products, Inc., supra*) in the context of conduct by government officials:

The Board is necessarily concerned with the protection of its procedures designed to provide fair elections. The Board looks with particular disfavor upon any attempt to misuse its processes to secure partisan advantage and it especially believes that no participant in a Board election should be permitted to suggest either directly or indirectly to the voters that this Government agency endorses a particular choice. These are general principles applicable to all forms of conduct, even though they were articulated in a case which involves a different context; i.e., circulation of marked sample ballots. We find they are applicable to the Union's conduct in this situation.

⁵ As explained in *SDC Investment*, 274 N.L.R.B. 556, 557 (1985) and *Ryder Memorial Hosp.*, 351 N.L.R.B. 214, 214-215 (2007), the Board's rule regarding altered sample ballots has evolved since *Allied*. However, the standard articulated in *Allied* has been repeatedly cited with approval.

(emphasis added.) The standard was also re-affirmed in *Usery Cos.*, 311 NLRB No. 41 (1993). This high level of scrutiny, applicable to Board neutrality cases, dovetails exactly with the Court's finding that such "suggestion" exists on the face of the Certification. Indeed, the Court has made an affirmative finding that this threshold level has been passed, which is the law of the case.

Moreover, the suggestion that the Board has actually participated in (and has placed its imprimatur on) a legally binding determination of majority status and bargaining authority vis-a-vis the Certification, is a far more prejudicial endorsement than found in the cited cases. On its face, the Certification proclaims that the question to be decided by the election has already been decided with the Board's participation.

The Board has explained this high level of scrutiny as a rule to "effectively preclude any reasonable inference that the Board favors or endorses any choice in the election." *Goffstown Truck Ctr., Inc.*, 356 N.L.R.B. No. 33, *2 (2010). Manifestly, where the Court has found that the Certification suggests Board involvement in a determination of bargaining authority, the Board cannot meet this burden of demonstrating the preclusion of "a reasonable inference" of such involvement.

The Board has applied this precept judiciously in the case of altered sample ballots, which might be mistakenly viewed as originating from the Board.

Specifically, the Board revised its official election ballot to include a disclaimer that the Board does not endorse any choice in the election and that any markings on the sample ballot have not been placed there by the Board. *Ryder Memorial Hosp.*, *supra*. Pursuant to *Ryder*, any reproduction of the Board's sample ballot must include the disclaimer language, which in turn: "effectively preclude[s] any reasonable inference that the Board favors or endorses any choice in the election." *Ryder*, 351 N.L.R.B. at 216.

The disclaimer rationale has been applied by the Board in circumstances other than altered ballots. In *Goffstown Truck Center, Inc., supra*, a union organizer visited employees' homes stating she [Loder] was "there 'on behalf of the NLRB' to determine how employees were voting, because 'they' were trying to determine whether to go forward with the election, and whether there was enough interest in union representation." at *1. The Board overturned the election, relying on the *Ryder* analysis:

[B]y misrepresenting that she was acting on behalf of the Board, Loder's conduct implicated concerns similar to those presented when a party to an election distributes an altered sample ballot with the Board's official disclaimer language deleted.

Id. at *2.

In J. Ray McDermott & Co., Inc., 215 N.L.R.B. 570, 570 (1974), the Board considered a union newsletter that included a pro union message added to a reprint

of a telegram sent by the Regional Director, informing the parties of the indefinite postponement of the election due to union charges. *Id.* The Board set aside the election because the petitioner⁶ "failed affirmatively to disassociate ... its partisan remarks from the signed name of the Regional Director . . . in the reproduced telegram" and that employees could reasonably have believed that "some or all of the partisan statements . . . constituted an endorsement . . . by the Regional Director." *Id.*⁷

Applying the *Ryder* rationale to the case at bar, a disclaimer was required to preclude the *suggestion* of Board's endorsement. In the absence of such disclaimer, the election must be overturned based on the Court's finding, which is the law of the case. Not only did the Union <u>not</u> disclaim the Certification, but it prominently relied upon it at campaign headquarters.⁸

_

⁶ The Union participated in the mock card-check and publicized the Certification at its campaign headquarters. Accordingly, there is no basis to assert that this case is distinguished because a different rule should apply to third parties than for the parties to the election.

⁷ Indeed, the Board has stated that in certain cases a disclaimer may be insufficient to remove the taint. *See*, e.g, *Thiokol Chemical Corp.*, 202 N.L.R.B. 434, 434 (1973) ("It is questionable whether any partisan in a campaign can credibly and effectively correct a misstatement, buttressed by official documents, about the legal principles applied by the public agency administering the statute."

⁸ As set forth at length in the Plaza's prior brief, other references within, and to, the mock card-check Certification corroborate the suggestion of Board/governmental involvement. *See* TPB at 19-29.

III. THE LAW OF THE CASE IS THAT THE CERTIFICATION WAS "WIDELY DISSEMINATED" REQUIRING THAT THE OBJECTIONS BE SUSTAINED IN LIGHT OF THE CERTIFICATION'S SUGGESTION OF BOARD INVOLVEMENT.

The Court found that the Board "was plainly wrong to conclude that there was an 'absence of evidence' of dissemination" and remanded the case to provide the Board with an opportunity to explain its departure from precedent. *Trump Plaza*, 679 F.3d at 832. As stated by the Court:

It is undisputed that (1) at least two Trump Plaza dealers attended the mock-certification rally; (2) the rally was covered by NBC40 on its 11 o'clock news that evening; (3) eighty-seven per cent of Trump Plaza dealers resided, and one hundred per cent of them worked, in the station's broadcast area; (4) the certification poster was displayed in the Union hall for six days before the election; (5) copies of the certification were available for distribution in the Union hall; and (6) two local newspapers published stories of the certification rally.

Id. at 830.

Most importantly, the Court found that "[g]iven the substantial media coverage . . . it blinks reality to say that Trump Plaza failed to provide 'evidence establishing that the Certification was widely disseminated among the unit employees." *Id.* (citing *Trump Plaza Assocs.*, 352 N.L.R.B. 628, 630 (2008)). Thus, the Court has established as the law of the case, that the Plaza established "wide dissemination" of the Certification.

⁹ In so finding, the Court expressly rejected, as contrary to the precedent of the Board and of the Court, that proof of dissemination is limited to "direct evidence."

In light of the foregoing, the Board must evaluate the challenged conduct (the mock card-check and Certification) in the context of wide dissemination. Plainly, as the Court has found, the Board has relied on equal or less dissemination to find challenged conduct objectionable without regard to the margin of victory. See e.g., Trump Plaza, 679 F.3d at 831. See e.g., Archer, 298 N.L.R.B. 312, 314 (1990) (altered sample ballot; election set aside, vote 382 to 41, 931%); Hudson Aviation, 288 N.L.R.B. 870 (1988) (Board agent's actions; election set aside, vote 26 to 5, 520%); N.L. Atlas Bradford, 240 N.L.R.B. 517, 517 (1979) (altered Board notice; election set aside, vote 119 to 93, 127%); Columbia Tanning, 238 N.L.R.B. 899 (1978) (attempted misuse of Board processes; election set aside, vote 44 to 34,

The Court explained that to do so would constitute an "unfair burden," obligating a party to poll sufficient members of the voting group as to the challenged conduct in order to establish the requisite effect on the election. *Trump Plaza*, 679 F.3d at 830.

[T]he Board has consistently held that whether an election should be invalidated based on alleged misconduct 'does not turn on election results but rather upon an analysis of the character and circumstances of the alleged objectionable conduct.' *May Department Stores Co. v. NLRB*, 707 F.2d 430, 434 (9th Cir. 1983) (citation omitted). Accord: *Westside Hospital*, 218 NLRB 96 (1975).

¹⁰ In *Westside Hospital*, 218 NLRB 96 (1975) the Board stated that "[t]he question of whether there has been unwarranted interference with free expression of choice does not turn on election results, or the probable election results." Similarly, in *In re Freund Baking Co.*, 336 N.L.R.B. 847, 848 fn.5 (2001), the Board stated:

132%); *J. Ray McDermott & Co.*, 215 N.L.R.B. 570, 570 (1974) (altered Board notice; election set aside, vote 40 to 33, 121%); *Glacier Packing*, 210 N.L.R.B. 571 (1974) (Board agent's actions; election set aside, vote 230 to 107 to 44, 152%); and, *Thoikol Chemical Corp.*, 202 N.L.R.B. 434, 434 (1973) (altered Board document; election set aside, vote 23 to 10, 230%). Indeed, the margin of victory is an illogical offset to improper electioneering, as the more effective the offending conduct, the greater the presumed impact on the voters.

In *Ryder* the Board found "other factors," including dissemination, irrelevant when Board neutrality is put at issue:

Given the layout of the new ballot, it is highly unlikely that an altered sample ballot's failure to include the new disclaimer language will be inadvertent. Therefore, if a party distributes altered sample ballots from which the disclaimer language has been deleted, we will deem the deletion intentional, and designed to mislead employees. The distribution of such altered ballots will be treated as per se objectionable.

351 N.L.R.B. at 218 fn. 13 (emphasis added). The *Ryder per se* rule logically applies to other situations involving Board neutrality, as the case *sub judice*. Even assuming, *arguendo*, that dissemination is a relevant factor, the Court has established "wide dissemination" as the law of the case. Accordingly, Board precedent requires that the objections be sustained.

¹¹ The percentages represent the ratio of the winning vote to the losing vote, to permit comparison of the votes of different unit sizes on the same scale.

CONCLUSION

Application of the findings of the Court, which are the law of the case,

require that the objections be sustained under well established Board precedent.

Respectfully submitted,

Dated: August 23, 2012

Theodore M. Eisenberg, Esq.

Matthew R. Porio, Esq.

Attorneys for Trump Plaza Associates, LLC

Fox Rothschild LLP

75 Eisenhower Parkway, Suite 201

Roseland, NJ 07068

(973) 994-7533

(973) 992-9125/facsimile

CERTIFICATE OF SERVICE

I, Matthew R. Porio, hereby certify that on August 23, 2012, I mailed, via Fedex, the Employer's Brief in Support of its Exceptions to the Administrative Law Judge's Decision to the following individuals:

(Original and 8 copies)

Lester A. Heltzer Executive Secretary National Labor Relations Board 1099 14th Street, N.W. Washington, D.C. 20570-0001

(1 Copy)

.

Dorothy L. Moore-Duncan, Regional Director National Labor Relations Board, Region 4 615 Chestnut Street, 7th Floor Philadelphia, PA 19106

William T. Josem, Esq. Cleary, Josem & Trigiani One Liberty Place, 51st Floor 1650 Market Street Philadelphia, PA 19103

Matthew R. Porio, Esq.

Dated: August 23, 2012.

ZNIZAUG 24 PH 12: 00 ORDIN SICTION